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DECISION



THE COMPTROLLER GENERAL
OF THE UNITED STATES
WASHINGTON, D. C. 20548

FILE: B-187283

DATE: November 4, 1976

MATTER OF: Balboa Insurance Co.

DIGEST:

1. Surety is not "financing institution" under Assignment of Claims Act, 31 U.S.C. § 203, 41 U.S.C. § 15 (1970), and assignment by prime contractor to surety of rights in Government contract is not binding on Government.
2. Upon proof of payment of all claims against payment bond surety and upon execution of indemnification and hold harmless agreement, prime contractor's surety may be paid funds retained by Navy.

Balboa Insurance Company (Balboa) has filed a claim for \$7,662.50 retained by the Department of the Navy (Navy) from progress payments under Navy contract N-62474-75-C-6434, for the rehabilitation of the chapel and auditorium and the replacement of roof drains at the Naval and Marine Corps Reserve Center, Los Angeles, California. Balboa was surety under performance and payment bonds furnished by the prime contractor, United California Builders (United). The Navy has retained \$7,862.50, which Balboa claims is due to it, less an agreed amount of \$200.00 for the completion by the Navy of punch list items involving general cleanup. Balboa has informed this Office that it has paid sums to three subcontractors on this contract totalling \$4,211.40 and has withheld payment to two other subcontractors totalling \$18,811.16 pending the completion of warranty work under the subcontracts. The Navy has advised that Balboa's actions have been taken pursuant to its obligations under the payment bond. The record indicates that Balboa is the only claimant of these funds.

Balboa argues that these funds should be paid to it as assignee of the rights in United's contract because of the general indemnity agreement signed by United and Balboa which provided for assignment to Balboa of United's rights in the contract in the event of United's default. We agree with the Navy that this assignment would not bind the United States because Balboa, as surety, does not qualify as a financing institution within the meaning of the Assignment of Claims Act, 31 U.S.C. § 203,

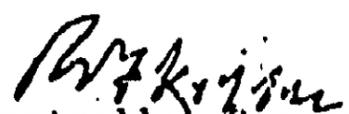
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41 U.S.C. § 15 (1970), General Casualty Co. v. Second National Bank of Houston, 178 F. 2d 679, 680 (5th Cir. 1949); Royal Indemnity Co. v. United States, 117 Ct. Cl. 736, 746, 93 F. Supp. 891, 894 (1950); B-155944, February 10, 1965; B-153608, March 17, 1964.

Citing Home Indemnity Company v. United States, 376 F. 2d 890 (Ct. Cl. 1967), Balboa contends it is entitled to demand payment from the Navy based on the fact that it is paying claims and that it was "instrumental in having the subcontractors complete the job * * *." Although Balboa may not be paid as assignee, it may be paid contract retainages as a payment bond surety when it submits reasonable evidence to the Navy that it has paid all the outstanding claims under the contract. As a general rule, for a payment bond surety to share in contract retainages, it must first pay all of the claims of the laborers and materialmen. American Fidelity Fire Insurance Co. v. United States, 206 Ct. Cl. 570, 575, 513 F. 2d 1375, 1378 (1975); B-163427, March 1, 1968; B-161093, March 6, 1967; B-155504, November 16, 1965. Moreover, Home Indemnity Company, supra, is consistent with this rule.

An indemnification and hold harmless agreement protecting the Government against a future claim by United should also be obtained prior to payment. See Argonaut Insurance Company, B-182983, February 4, 1975, 75-1 CPD 80; Balboa Insurance Company, B-181471, July 3, 1974, 74-2 CPD 7, and cases cited therein.

Deputy


Comptroller General
of the United States